

**Kentucky Environmental Quality Commission
Kentucky Energy Strategy
Public Meeting**

Meeting Minutes

May 26, 2005

Capitol Annex Room 113

Frankfort, Kentucky

EQC Commissioners Present

Lindell Ormsbee, Chair

Betsy Bennett, Vice Chair

Gary Revlett

Patty Wallace

Gordon Garner

Eugene Zick

Speakers/Representatives Present

Susan Bush, Commissioner, Dept. Natural Resources

Sean Alteri, Division for Air Quality

Bill Caldwell, Division of Water

Absent

Laura Knoth

EQC Staff Present

Leslie Cole, Executive Director

Erik Siegel, Assistant Director

Frances Kirchhoff, Executive Secretary

In honor of Leslie Cole's retirement, Cabinet Secretary LaJuana S. Wilcher made a presentation of an Admiral certificate as a token of appreciation to Ms. Cole with sincere thanks for 20 years of public service.

Open Meeting

Mr. Lindell Ormsbee, Chair of the Environmental Quality Commission opened the meeting at 1:15 p.m. There were approximately 20 people in the audience. The first order of business was to approve the minutes of the March 3 EQC meeting. A motion was made by Betsy Bennett, seconded by Gary Revlett, and passed unanimously.

Black Water Task Force

Mr. Ormsbee then introduced the first agenda item the Kentucky Black Water Task Force: Findings and Actions. Ms. Susan Bush, Commissioner for the Department for Natural Resources gave a PowerPoint presentation of the highlights of the report. The mission of the Black Water Task Force was to investigate the causes of black water spills, examine the impact on human health and aquatic resources, to develop recommendations to minimize the number and severity of black water spills, and prepare a report of the findings. The report was released in April. The report in full detail can be viewed at <http://www.environment.ky.gov/> Mr. Don Bows, one of the members of the Black Water Task Force made some personal comments concerning the task force.

Question/Answer

Betsy Bennett---How are the BMPs (Best Management Practices) enforced?

Commissioner Bush---The BMPs are enforced by KPDES permits.

Recommendations

Betsy Bennett made a motion that EQC officially commend the Task Force for its work and encourage legislation to make Emergency Action Plans mandatory. It was seconded by Gordon Garner and passed unanimously.

Energy Plan

The next agenda item was the discussion of the KY Energy Plan and Oil and Gas Drilling. At the March 10th meeting of the EQC, the original plan and oil and gas drilling trends and issues were reviewed. Based on that discussion the Commission drafted a Recommendation and Resolution. The Chair read aloud the Resolution. After the reading, Ms. Patty Wallace requested to add an attachment to the Resolution as her specific comments. Ms. Wallace read aloud the attachment. It was moved by Patty Wallace that her opinion be added to the Resolution as an appendix. It was seconded by Gordon Garner. A vote was taken to add Ms. Wallace's opinion to the Resolution. The motion carried. Betsy Bennett made a motion that EQC pass the Resolution. The motion was seconded by Gary Revlett and passed unanimously. The Chair read aloud a draft letter to Secretary Wilcher concerning oil and gas drilling issues of the March 10th meeting and recommended to Secretary Wilcher that the Environmental and Public Protection Cabinet review the oil and gas program and consider regulatory and/or statutory changes. Betsy Bennett made a motion to approve the letter to Secretary Wilcher. The motion was seconded by Gene Zick. The motion carried unanimously.

Air Regulations 401 KAR 50:045 and 401 KAR 50:017

The next agenda item was a review of proposed air regulations. The Chair introduced Sean Alteri, Division for Air Quality. Mr. Alteri gave an over view of the air regulations. The reason 401KAR 50:045 was revised and 401KAR 50:016 was repealed was because there were inconsistencies with regulations that were promulgated after 1985. In 1984 KRS 13A:100 was amended to direct all agencies to write down in regulation their guidance documents. At that time the Division put together the policy manual trying to give insight on how the permitting decisions are made. Since 1985, DAQ has promulgated several regulations, including the recent amendments to the PSD/NSR program. These promulgations conflicted with the provisions and guidance in the policy manual. That was the main reason to eliminate the policy manual; however, DAQ wanted to keep important provisions dealing with performance testing and amended 50:045.

Question/Answer

Betsy Bennett---Concerning the performance testing regulation and exemptions, you said that one instance where the waiver would apply is if the source took in operating limit on effected emissions unit. It seems like if a source took a lower emissions limit then they probably wouldn't come under the regulation anyway? I have a problem with a case-by-case approved if you don't know what the criteria are if they are going to be excused from a performance test.

Sean Alteri---That wasn't an emissions limitation; I believe it is an operating limitation. A source will often times come to us with the parameters, the thresholds; they may have a bottle-neck in the facility. But they will take an operating limitation and there is no reason to test them at full capacity. Our conditional major permits are examples of those.

Gary Revlett---Is there a reason we couldn't say something that specific in the regulation?

Sean Alteri---It varies. In order to maintain flexibility, that waiver has always been there. It is inside the policy manual now. It is not a waiver of 'you're free to pollute as much as you want or to operate at any rate that you want'. It is more of certain instances where you shouldn't perform or do performance test at full capacity.

Gary Revlett--- Is there any intension to develop a new policy manual?

Sean Alteri---We are trying to compile any kind of decisions that we use to interpret the regulations and if we deem that it is necessary, yes, we will go ahead and put together another policy manual and incorporate it.

Mr. Revlett made the comment that without a manual, the lay person, the one who has to show compliance, will have a difficult time knowing what he is suppose to do. He strongly encouraged the Cabinet (all Divisions) to document how they do things.

Leslie Cole---Can you have guidance documents now under 13A?

Sean Alteri---You still have to include those as materials incorporated by reference.

Leslie Cole--Can't they stand alone?

Sean Alteri---No. That was why 13A:100 was put into place. So that everyone knows the guidelines and what the terms are. And so as we develop this it would have to be incorporated into a regulation, there would be public comment and we would encourage everyone to make comments; especially those involved in operations.

Gary Revlett—I think that is very important because if you don't do that, the trend is going to be more and more inconstancies and people unaware of the interpretations.

Gary Revlett made a motion that an amendment be made to encourage the DAQ (all divisions) that any time they appeal a policy manual that they would certainly prepare a new policy manual that would be incorporated by reference so there would not be uncertainties as we interpret regulations.

Mr. Alteri added that if EQC notices those inconsistencies or ambiguous conditions in a regulation then as it comes before you, you should point this out or during the public comment probably would be the more appropriate place. Regulations should be straight forward enough that everybody knows what the rules are.

Gordon Garner commented that there is such a lack of plain English in a lot of the regulations that are adopted in Kentucky and every other state are just a copy of the federal language, and the more they try to use plain English, the worse it gets. We have so many legal interpretations that are applied to regulations now that it is very difficult to understand what the regulation says.

Gary Revlett commented that he too agrees with Mr. Garner. He stated that he is beginning to pull out the Statement of Consideration (which does not get incorporated into a regulation) as his interpretation for decisions of regulations. He believes that a manual of some sort should be done even if it does nothing more than make sure that it contains all of the Statements of Consideration so that someone in the future doesn't have to figure out how something was interpreted when you developed that regulation.

Recommendation

Gordon Garner made a motion that EQC approve Air Regulations 50:045 and 50:017 and that the Cabinet consider the development of a policy guidance manual to further clarify and provide for consistent interpretation of regulations. Betsy Bennett seconded the motion and the motion passed unanimously.

Water Regulation KAR 4:010 Water withdrawals

The Chair next introduced Mr. Bill Caldwell, Supervisor for the Water Quality Program. The amendment to KAR 4:010 is to establish a uniform procedure for issuing water withdrawal permits to take into consideration a wide range of needs made by the regulated community. Currently, the applications for larger complex long-term projects cannot receive any regulatory assurance that water is going to be available once these projects are completed. The regulation is being amended to allow a water withdrawal permits be issued during a time when this assurance would be useful for planning for financing and developing a project. For the past three decades, water withdrawal permits have been issued in conformance with KRS 151:170 which briefly lays out some criteria for issuance which includes that a water withdrawal permit be specific in quantity, in time, in place and in rate of withdrawal; that affirmative withdrawal is not detrimental to the public interest, which can include environmental considerations or the rights of other water users, and that no permit will be denied a responsible applicant who has established an amount of water for which he has a need for a useful purpose. Historically these criteria for demonstrating the need for useful purpose had included the ability to draw water pretty much immediately upon issuance of the permit. Theoretically, the applicant could just apply for a permit the day before they withdraw to allow the Division of Water time to assess the application. Over time, the division has generally asked that the permit application submit the application around 6 months ahead of the anticipated need for the water. However the actual range of time has been any where from a few weeks to up to 12 months depending upon certain circumstances. In some case permits have had to be denied on large complex projects that require long lead times in access of a year. This regulation has been amended to clarify procedures where a permit can be issued on a broader spectrum of the regulated community. It contains conditions to demonstrate that the criteria of those in KRS 151:170 are met and these have been written to insure proof of steady measurable progress towards a completion of the long term projects and subsequent withdrawal of water that is still specific in terms of quantity, time, place, and rate.

Questions/Answer

Lindell Ormsbee---How do we know that if we issue a permit for a project years in the future, that we are not tying up water that may be useful for some other application? What assurance do you have, in place, to assure there is going to be adequate water?

Bill Caldwell---First let me say that the statement of consideration has not been completed or approved.

It all goes to the competition for future use. How do you give someone assurance today and at the same time provide for water use for tomorrow; pretty much the same way we do it now. We always intended not to give a single person access to all the available water at a site because it goes against the law that says you need to have all the users respected. The way the permitting guidelines have developed over the years is a conservative approach in allocating a certain percentage available flow to a single user and not allowing that user to see that percentage once they have reached that amount. By allocating a user today 10 percent of the available flow, whether they use it tomorrow or 3 years from now, that 10 percent is all that has been allocated to that user and the remaining water is available to go to another user today, tomorrow or 3 years from now. We try to look at the current use, the anticipated use, and not permit the full available amount today in anticipation of the potential competing uses tomorrow.

Lindell Ormsbee---What is the basis of determining the available use—where do you get that percentage from?

Bill Caldwell---The current policy procedure was developed by long experience in this section and basically flow duration curves (10 percent of the lowest average monthly flow--which usually

occurs in October is roughly correlated with about an 85th percent duration in the low flow month) and when the people that pre-date me began allocating water using that, they considered it to be a conservative approach because they did not have sufficient data to take it much further. That is where the 10 percent came from. In most cases, it is a conservative approach and that is the allocation that a single user could have whether it be for tomorrow or for 3 years from now.

Lindell Ormsbee---I know for example that in the Kentucky River a lot of those permits have been amended with a tiered approach to tie it to the flow or stage. When you issue a permit, does it have built into it this type of tiered system so that you can allocate them a certain percentage but with some contingency that if the level starts to drop there is a basis for curtailing those uses?

Bill Caldwell---Yes, we do. The permits on the Kentucky River have extensive flow schedules. Most permits do that as well, but in a simpler way. Most permits we issue on a free-flowing stream simply state that when flow reaches a certain critical low flow point, typically the 7Q10, you have either got to decrease drawing or just stop altogether. That protects the stream in those drought situations. On the Kentucky River, the users are given a step-down kind of schedule so that as the flow in the river subsides, the withdrawals have to follow that flow subsidence so that they are not using the water at a rate faster than what the river can provide.

Lindell Ormsbee---So there is a provision on withdrawal permits that once the river drops to 7Q10 that basically the decision of subsequent allocations basically goes back to DOW?

Bill Caldwell---The only time the DOW would have the authority to step in and start allocating is during a state of emergency from the Governor.

Gordon Garner---Are there any exempt uses?

Bill Caldwell---Currently there are exempt uses in Kentucky. Those are by statute, exempted or steam-generating coal fired power plants; Oil and gas injection with water which was withdrawn for the purpose and agriculture and domestic use which includes irrigation

Gordon Garner--So most of the service uses in Kentucky are exempt from withdrawal permits. Are source protection plans being considered more important? For instance if there was a drinking water utility that has a source water protection plan and someone is wanting to do a stream withdrawal, since the Division of Water does approve source water protection plan and also issues permits...

Bill Caldwell---Division of Water is going to know it is there. If there was ever a situation where we suspect that an additional withdrawal within a zone one or zone two MIGHT cause a water quality problem, we would certainly take that into consideration.

Gordon Garner--Are the drink water folks normally advised or have opportunity to comment in the process of considering a permit that may effect their.....?

Caldwell---Are you talking about the Drink Water Branch in the Division of Water?

Gordon Garner---Yes. If someone wants to have a withdrawal permit and it is in a watershed of a drinking water utility that has a source water plan.....

Caldwell---In that case, we probably would send some kind of notification to the Drinking Water Branch particularly if it is impacting the water supplier intake. Of course if it is a water supply intake on the Ohio River and the withdrawal in an amount a few miles above the volume of the river, we would probably say the chances of that causing impact. We don't do it in every case but in cases where we suspect there could be an issue we will go ahead and get their opinion as we do in ground water and other branches.

Betsy Bennett---Wouldn't it make sense to just have public notices for these permits such as you do with all the other permits?

Caldwell---I don't know why we shouldn't have public notice. I know that it is not required and someone other than I might want to address this—as to why there is not public notice for water withdrawal permits.

Betsy Bennett/Gordon Garner---I think we have a casual history. I'd like to see this group consider this. We have been rather 'water rich' relatively speaking and that may not always be. In some cases we have already run into the walls. I think that the kinds of things we are discussing really need to be thrown into play.

Gary Revlett---What is the timing on this recommendation to the statement of consideration?

Leslie Cole---We can go ahead and make recommendations. They can consider our recommendations at any time. We can go ahead and make recommendations at this point.

Gordon Garner---This issue of us having to consider something before the statement of consideration is ...I have always been uncomfortable doing that.

Cole--- The problem is when we do it after, it pretty much has been set. Now is the time to express your concerns especially if you want to make a recommendation concerning public notification? They can amend it during a legislative committee hearing if they like , but chances are you are more likely to get something done now then you will later.

Gordon Garner--- I think the permit notification covers a lot of the ground that we have been talking about. At least the people who might be affected can have an opportunity to get their concerns addressed.

Lindell Ormsbee--- Or we can make a recommendation without taking action on the regulation.

Betsy---because we have a June meeting.

Leslie Cole --- If we don't have a June meeting, then you have to go ahead and take action on this regulation.

Betsy Bennett--- But we do have a June meeting.

Recommendation

Gordon Garner made a motion that the EQC vote to postpone action on this regulation until the June, 2005 meeting and EQC recommended that the Division of Water and the Environmental and Public Protection Cabinet incorporate public notice and interagency notification requirements for water withdrawal permits. Betsy Bennett seconded. The motion passed unanimously.

OTHER BUSINESS

Executive Leslie Cole gave the Commission an updated progress report. Toxic indicators are in the final stages of review. We did publish some of that in our last news letter. Mr. Erik Siegel is working on some enforcement trends. This is something that you will probably want to review with the new director. The final report on the Forest Roundtable was released and we sent our recommendation to the Governor. Energy plans will be considered today. Martin County received \$150,000.00 for testing drinking water. We have been working with DEP to get that MOU moving. Earth Day went real well—partnering with League of Cities and KACO. Partnering in the future might be a good idea. Children's Environmental Health was featured in

the last issue of Land, Air and Water. Public outreach—The May newsletter has been sent out and we are revamping and updating the web site. We had 13 inquiries and about 400 visits to our web site. Erik continues to attend meetings on Green Schools and Leslie has had several meetings with Scott Smith and others on the transition to a new director.

The next EQC meeting is scheduled for June 23.

With no further business, the meeting adjourned at 4:05 p.m.

Signed Lindell Ormsbee, Chair

Date